

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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(Procedure and Administration)

subject: Notice of Nonjudicial Sale Under Section 7425

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

- 1) Is notice sent by regular mail with delivery confirmation valid notice for purposes of 7425(c)?
- 2) Assuming that the notice is invalid and the lien remains in place following the sale, is the Service also allowed to seek the surplus proceeds from the sale?

CONCLUSIONS

- 1) No. Notice sent by regular mail with delivery confirmation does not meet the delivery requirement of section 7425(c).
- 2) Yes. The Service can seek the surplus proceeds from sale in addition to enforcing its lien on the property.

FACTS

In a large number of cases, the Service has received notice of a nonjudicial sale by regular mail with delivery confirmation. The Service receives the notices prior to the sale and takes no subsequent action with regard to the notices or the sale. We assume that the notices are otherwise correct and would be valid if sent by registered or certified mail.

LAW AND ANALYSIS

Delivery Requirement in I.R.C. §7425(c)

I.R.C. § 7425 was added to the Internal Revenue Code of 1954 as part of the Federal Tax Lien Act of 1966, for purposes of protecting the government's interests in cases of judicial and nonjudicial sales of a taxpayer's real or personal property. Section 7425(b) provides protection for the government where a nonjudicial sale of property on which the government holds a lien takes place without notice to the United States. Under subsection (b)(1), if notice of such lien was properly filed more than 30 days before a nonjudicial sale and the government is not given proper notice of the sale at least 25 days prior thereto, such sale of real or personal property "shall...be made subject to and not disturbing the lien."

Section 7425(c) provides that "[n]otice...shall be given (in accordance with the regulations prescribed by the Secretary) in writing, by registered or certified mail or by personal service, not less than 25 days prior to such sale, to the Secretary." The requirement that such notice be made by registered or certified mail or by personal service is also provided in the "Instructions for Preparing a Notice of Nonjudicial Sale of Property and Application for Consent to Sale" See Publication 786 (Rev. 1-2006).

A key feature of both registered and certified mail service is that signature is required for delivery. Although USPS's delivery confirmation service is similar to certified mail, signature confirmation is not required for final delivery with the delivery confirmation service. Thus, the plain language of section 7425(c) specifically requires notice by "registered or certified mail," and such modes of delivery are distinguishable from the delivery confirmation service.

In addition, courts that have addressed this issue have interpreted the notice requirement of section 7425(c) as mandatory and allowed for no alternative to the specified modes of delivery. Colorado Property Acquisitions, Inc. v. United States, 894 F.2d 1173 (10th Cir. 1990)(recognizing the harshness of this rule which "allows the IRS to receive actual notice...ignore the notice and still retain the right to levy upon the property"); See also United States v. Tagliareni, 2007 WL 1586156 (N.D. Ala. 2007)(applying the statutory interpretation from Colorado Property Acquisitions, Inc. and

finding the IRS lien valid and enforceable given the lack of valid notice). Thus, the requirement that notice be sent by registered or certified mail is strictly construed, such that notice sent by any other form (e.g., regular mail with delivery confirmation) is invalid.

The Ability of the Service to Seek Surplus Proceeds from a Nonjudicial Sale Where I.R.C. §7425 Notice Was Invalid

As discussed above, pursuant to section 7425(b) where a nonjudicial sale occurs without notice to the United States, the Government's lien remains on the property after the sale. Nowhere in the statutory or regulatory scheme is there a provision limiting the Service's recovery to enforcement of the lien. It follows that the Service is also entitled to seek the surplus proceeds from the nonjudicial sale of the property. See Simon v. United States, 756 F.2d 696, 698 (9th Cir. 1985).

In Simon, the Simons purchased real property at a tax auction sale made by Los Angeles County. The county tax collector failed to provide the Service with notice as required by section 7425. Therefore, the Simons purchased the property subject to the federal tax lien. In addition, the Service levied upon and was paid the surplus proceeds from the sale. The Ninth Circuit rejected the Simons' argument that they should be subrogated to the rights of the government to the extent of the surplus proceeds, finding that the surplus proceeds and the proceeds from the sale of the property by the government were to be applied to reduce a legitimate federal tax lien. The holding in Simon illustrates that the Government has the right to seek payment of surplus proceeds from the nonjudicial sale, even though the Service retains its lien on the property.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Ultimately the nature of the property rights of interested persons after a nonjudicial sale is governed by state law. Therefore, a thorough analysis of the applicable state law may be required to determine the property rights of each party after the sale.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call **01203 621000** if you have any further questions.